

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Robert D. Partain, #221068,) C/A No. 3:09-3163-MBS-JRM
)
Plaintiff,)
)
vs.)
) Report and Recommendation
)
Sean Karr, Probation Agent, and)
Judge Macauley, Judge 10 th Judicial Circuit,)
)
Defendants.)
_____)

This is a civil action filed *pro se* by a state prison inmate.¹ Plaintiff is currently confined at Kirkland Correctional Institution, following his conviction on a probation violation charge in Anderson County, South Carolina. In the Complaint filed in this case, Plaintiff asserts that the judge who sentenced him on probation violations did not give him the requisite credit for a period of time he served in Greenville county jail on the criminal charges that ultimately resulted in the probation violation charge prior to being released when the charges were dismissed in Greenville county. After the dismissal, it appears that Plaintiff was released from jail, but was picked back up on probation violation charges (based on the dismissed criminal charges) just four days later. Upon sentencing by the Anderson County Court, Plaintiff received credit for the incarceration time after he was picked back up, but not for the time (358 days) that he spent in Greenville County before the charges were dismissed.

Plaintiff claims that the reason the trial judge (named as a defendant) did not give him credit for that first period of incarceration was because his periods of incarceration "was not continuous incarceration." He also claims that the only reason his incarceration was not considered continuous was because his

¹ Pursuant to 28 U.S.C. §636(b)(1), and D.S.C. Civ. R. 73.02(B)(2)(e), this magistrate judge is authorized to review all pretrial matters in such *pro se* cases and to submit findings and recommendations to the District Court. See 28 U.S.C. § § 1915(e); 1915A (as soon as possible after docketing, district courts should review prisoner cases to determine whether they are subject to summary dismissal).

probation officer (also named a defendant) "failed to put the two warrants [for probation violation that he had issued when Plaintiff was first picked up] on NCIC." As a result of this alleged failure, when the criminal charges on which he was initially picked up in Greenville County were dismissed, Plaintiff was released by the detention center, thus creating the "break" in his incarceration. Plaintiff contends that, without the disputed credit, his sentence violates his federal constitutional rights because he is being incarcerated longer than he should be. As relief, Plaintiff asks this Court to order that he get credit for the original period of confinement and he also asks for compensatory damages for each day he is kept in prison beyond the time that he should have been had the credit been allowed. It is not clear from the Complaint whether or not Plaintiff has instituted an appeal or a post-conviction relief (PCR) application to bring his sentencing claim to the attention of South Carolina and Anderson County authorities. Regardless of his actions in that regard, Plaintiff's complaints about sentencing credits and/or improper sentencing are barred by case authority from the United States Supreme Court and this case should be summarily dismissed.

Under established local procedure in this judicial district, a careful review has been made of Plaintiff's *pro se* Complaint filed in this case. This review has been conducted pursuant to the procedural provisions of 28 U.S.C. § § 1915, 1915A, and the Prison Litigation Reform Act of 1996, and in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951 (4th Cir. 1995)(*en banc*); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Boyce v. Alizaduh*, 595 F.2d 948 (4th Cir. 1979).

Pro se complaints are held to a less stringent standard than those drafted by attorneys, *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case. *Erickson v. Pardus*, 551 U.S. 89 (2007); *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980); *Cruz v. Beto*, 405 U.S. 319 (1972). When a federal court is evaluating a *pro se* complaint, the plaintiff's allegations are assumed to be true. *Fine v. City of N. Y.*, 529 F.2d 70, 74 (2d Cir. 1975). Nevertheless, the requirement of liberal construction does

not mean that this Court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Social Servs.*, 901 F.2d 387 (4th Cir. 1990). Even under this less stringent standard, however, the Complaint filed in this case is subject to summary dismissal under the provisions of 28 U.S.C. § 1915(e)(2)(B).

Plaintiff's Complaint is subject to summary dismissal based on the United States Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1997). With respect to actions filed pursuant to 42 U.S.C. § 1983 such as the present one alleging constitutional violations and/or other improprieties in connection with state criminal convictions and sentences,² the Court stated:

We hold that, in order to recover damages [or other relief]³ for allegedly unconstitutional conviction or imprisonment, or for other harm whose unlawfulness would render a conviction or sentence invalid, . . . a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Heck, 512 U.S. at 486-87. By the above statements, the United States Supreme Court ruled that until a criminal conviction and/or sentence is set aside by way of appeal, PCR, habeas, or otherwise, any civil rights

² Section 1983 is the procedural mechanism through which Congress provided a private civil cause of action based on allegations of federal constitutional violations by persons acting under color of state law. *Jennings v. Davis*, 476 F.2d 1271 (8th Cir. 1973). The purpose of section 1983 is to deter state actors from using badge of their authority to deprive individuals of their *federally guaranteed* rights and to provide relief to victims if such deterrence fails. *McKnight v. Rees*, 88 F.3d 417(6th Cir. 1996)(emphasis added). Plaintiff's claims of unconstitutional confinement fall within the coverage of § 1983.

³ See *Johnson v. Freeburn*, 29 Fed. Supp.2d 764, 772 (S.D. Mich. 1998)(under *Heck v. Humphrey*, nature of relief sought is not critical question; rather, it is the grounds for relief); see also *Clemente v. Allen*, 120 F.3d 703 (7th Cir. 1997)(injunctive relief sought).

action based on the conviction, sentence, and related matters will be barred.⁴

As stated above, it is unclear whether or not Plaintiff has filed an appeal or a PCR case in Anderson County; however, it is clear that Plaintiff's probation-violation conviction and sentence have not been overturned since he is still incarcerated. The claims of improper sentence credits raised by Plaintiff, if true, would invalidate the sentence he received and are, thus, the types of constitutional-violation claims to which *Heck* applies. Since Plaintiff has not been successful in having his Anderson County probation-violation sentence set aside by way of appeal, PCR, habeas corpus, or otherwise, and because Plaintiff's allegations, if true, would necessarily invalidate his sentence, he cannot sue either of the Defendants based on their involvement in his prosecution and ultimate conviction and sentencing. This case is subject to summary dismissal as to both Defendants without issuance of service of process.

Recommendation

Accordingly, it is recommended that the District Court dismiss the Complaint in this case *without prejudice* and without issuance and service of process. *See Denton v. Hernandez; Neitzke v. Williams; Haines v. Kerner; Brown v. Briscoe*, 998 F.2d 201, 202-04 (4th Cir. 1993); *Boyce v. Alizaduh; Todd v. Baskerville*, 712 F.2d at 74; *see also* 28 U.S.C. § 1915(e)(2)(B); 28 U.S.C. § 1915A (as soon as possible after docketing, district courts should review prisoner cases to determine whether they are subject to summary dismissal). Plaintiff's attention is directed to the important notice on the next page.



Joseph R. McCrorey
United States Magistrate Judge

December 30, 2009
Columbia, South Carolina

⁴ *But see Wilson v. Johnson*, 535 F.3d 262, 268 (4th Cir. 2008) (Former prisoner's § 1983 claim alleging that his prior imprisonment was wrongful, filed after his sentence expired but before he was able to complete post-conviction relief process, was cognizable; prisoner was not eligible for habeas relief since his sentence had expired and he would be left without any access to federal court to contest allegedly wrongful imprisonment if his § 1983 claim was barred.).

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).